

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

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| STATE OF OKLAHOMA, et al. |) | |
| |) | |
| Plaintiffs |) | |
| |) | |
| v. |) | Case No. 4:05-cv-00329-GKF-SAJ |
| |) | |
| TYSON FOODS, INC., et al |) | |
| |) | |
| Defendants |) | |

SIMMONS FOODS, INC.'S MOTION FOR PROTECTIVE ORDER
AND INCORPORATED BRIEF IN SUPPORT

Pursuant to Fed. R. Civ. P. 26(c), Defendant Simmons Foods, Inc. (“Simmons”) moves this Court for an Order protecting it from the *State of Oklahoma’s September 18, 2008, Set of Requests for Production to Simmons Foods, Inc.* (copy attached as Exhibit 1) which are overly broad and seek the production of irrelevant and highly confidential business information.

I. BACKGROUND

On July 16, 2008, Simmons and Peterson Farms, Inc. (“Peterson”) entered into an Asset Purchase Agreement (“APA”) pursuant to which Simmons purchased from Peterson certain assets associated with live poultry production and natural gas production. None of the assets purchased by Simmons are located in the Illinois River Watershed (“IRW”), other than whatever birds were in the possession of independent contract growers at the time. The contracts with the independent contract growers are not assignable and were not included in the asset sale.¹ Under the APA, Simmons did not

¹ Whether to enter into a contract with Simmons was a decision made by the independent contract growers in negotiations with Simmons. Information concerning the current list of growers in the IRW who contract

assume any liability for Peterson's operations or actions prior to the date of closing of the sale.

Simmons and Peterson both consider information concerning the APA, other than what is disclosed in the previous paragraph, to be highly confidential. Specifically, the financial aspects of the transaction and any negotiations that occurred have been kept private by both parties. Simmons and Peterson are both small, family-owned companies and, as such, are permitted to keep their financial affairs private from public purview. Furthermore, Simmons continues to operate as a poultry producer in what is a highly competitive market. Simmons not only competes against its codefendants in this lawsuit, but other poultry companies as well. The disclosure of any of Simmons' business strategies or financial information could have a devastating effect on its ability to compete in the market and could offer its competitors an unfair advantage.

Plaintiff's September 18, 2008, Requests for Production to Simmons ("RFPs") seek production of every detail of the asset sale, including but not limited to, business strategies, financial aspects, and internal justifications for the purchase of the assets. Clearly, information concerning the purchase of assets not located in the IRW and not associated with any claim of Plaintiff is not relevant and should be protected from disclosure.

Simmons' counsel and Peterson's counsel held a meet and confer with Plaintiff's counsel in an attempt to reach an agreement to limit the scope of Plaintiff's RFPs but were unsuccessful. On October 7, 2008, Simmons' counsel and Peterson's counsel conferred by telephone with Plaintiff's counsel Richard Garren and Louis Bullock. At

with Simmons is being prepared in supplementation to discovery requests previously propounded by Plaintiff and the information will be provided to Plaintiff in the near future.

that time, Simmons' counsel and Peterson's counsel expressed their concern over the broadness of the RFPs. Simmons' counsel and Peterson's counsel also provided Plaintiff's counsel with certain facts concerning the asset purchase, including that it was an asset sale concerning assets outside the IRW, grower contracts were not transferred, etc. After some discussion, Plaintiff's counsel gave an oral recitation of the limited information they thought could be relevant, but when asked to reduce that limitation to writing, Plaintiff's counsel refused. Despite the fact that Plaintiff has already exceeded the number of interrogatories allowed under the Federal Rules of Civil Procedure, Simmons' counsel and Peterson's counsel offered to permit Plaintiff to submit additional interrogatories aimed at obtaining the limited information that could arguably be discoverable. However, Plaintiff's counsel declined that invitation.

On October 16, 2008, Peterson and Simmons again sought the cooperation of Plaintiff's counsel in limiting the scope of the RFPs. (See email from S. McDaniel to Plaintiff's counsel attached as Exhibit 2). Plaintiff's counsel did not respond to this email. Thus, Simmons has no choice but to seek the Court's intervention in this matter. Simmons respectfully requests that this Court find that the RFPs are overly broad and seek irrelevant information and Order that Simmons does not have to respond to them.

II. ARGUMENT AND AUTHORITIES

Parties are only entitled to discover information that is relevant to a claim or defense in the case. Fed. R. Civ. P. 26(b)(1). Overly broad discovery requests are not permitted, instead, a party has a duty to craft discovery requests in a manner that describes "with reasonable particularity each item or category" of information sought. Fed. R. Civ. P. 34(b)(1)(A). "[T]he Supreme Court has underscored that 'the

requirements of Rule 26(b)(1) that the material sought in discovery be relevant should be firmly applied, and the district courts should not neglect their power to restrict discovery [to protect] a party or person from annoyance, embarrassment, [or] oppression” *Regan-Touhy v. Walgreen Co.*, 526 F.3d 641, 649 (10th Cir. 2008) (quoting *Herbert v. Lando*, 441 U.S. 153, 177 (1979)).

Plaintiff’s RFPs are overly broad because not only do they seek information that is not relevant to the claims or defenses in the case but also, and more significantly, they seek highly confidential financial and strategic business information. Plaintiff’s claims concern the land application of poultry litter in the IRW. Clearly, the reasons why and the amounts paid by Simmons for the purchase from Peterson of natural gas production assets and poultry processing assets not located in the IRW do not have any relevance to the land application of poultry litter in the IRW. It is well established that poultry litter comes from the barns of the independent contract growers, not from Simmons’ or Peterson’s live poultry processing facilities and certainly not from a natural gas facility.

Moreover, even if Plaintiff could strain the definition of “relevance” to the point that it could arguably include some of the information sought by Plaintiff, the RFPs are so broadly drawn that they include within their reach information that is highly confidential to Simmons, the production of which could be prejudicial to Simmons as a competitor in the poultry market. As stated previously, Simmons is a privately-held, family owned company. As such, its financial records, business strategies and marketing plans are held in strict confidence. Several of Simmons’ competitors in the poultry market are codefendants in the case. Thus, the disclosure of the requested information could be highly prejudicial to Simmons.

The specific RFPs are as follows:

Request No 1: Please produce copies of all transaction documents (including any indemnification agreements) pertaining to your acquisition of Peterson Farms, Inc.'s poultry operations that was announced on or about June 3, 2008.

RFP number one is clearly overly broad in that it seeks production of all of the transaction documents without regard to the contents of the documents and the fact that highly confidential business and financial information is contained therein. In the meet and confer telephone conference Plaintiff's counsel could not identify any justification for seeking all of the documents. Instead, they could only identify a few categories of information that could arguably be relevant to the issues in this case. In fact, Plaintiff's counsel stated that they intentionally crafted the RFPs broadly because they were not sure what they were seeking. The party seeking discovery has the burden of narrowly tailoring its requests in such a manner as to seek only relevant information; "fishing expeditions" are not permitted. *See e.g. Martinez v. Cornell Corrections of Texas*, 229 F.R.D. 215, 218 (D.N.M. 2005) (*internal citations omitted*).

In the case *Hope for Families & Community Service, Inc. v. Warren*, 250 F.R.D. 653 (M.D. Ala. 2008), the Court was faced with whether to order the production of financial information of VictoryLand. Plaintiff in that case accused VictoryLand and others of RICO violations for allegedly unlawfully limiting competition in the area. Plaintiff argued that VictoryLand's financial information was relevant to establish economic motive for the alleged RICO violations (and possibly as a measure of Plaintiff's potential lost earnings). In denying the plaintiff's motion to compel, the court noted that VictoryLand is a closely-held corporation and stated that "while revenue and

profit information only marginally supports the plaintiff's claims, its slight evidentiary utility is far outweighed by the intrusiveness and potential injury of the release of the information about the operation of a closely-held corporation." Similarly, Simmons and Peterson are private closely-held corporations that do not publish their confidential business information such as financial records, business strategies and marketing plans. Moreover, to order production of the information sought by Plaintiff in this case makes even less sense than in *Hope for Families* because Plaintiff cannot demonstrate that the information sought is even "marginally" relevant to the issues of this case.

Simmons' counsel and Peterson's counsel offered to provide a redacted copy of the APA which would disclose: the sale was an asset purchase and Simmons did not assume liability for Peterson's operations prior to the sale; the assets purchased, aside from the birds, are not located in the IRW; and, that the grower contracts are not transferrable and thus were not "sold" to Simmons. Plaintiff's counsel would not accept that as a satisfactory response. Simmons' counsel and Peterson's counsel asked Plaintiff's counsel to redraft the RFPs to seek only the information Plaintiff's counsel verbally stated was relevant during the meet and confer. Plaintiff's counsel refused to revise the RFPs. Since Plaintiff's counsel refused to revise the RFPs, the Court has no choice but to review the RFPs as written. Simmons respectfully asserts that a review of the RFPs can lead to no conclusion other than a finding that the RFPs are overly broad.

Request No. 2: Please produce copies of any documents referring or relating to any environmental due diligence activities, reports, disclosures or investigations pertaining to your acquisition of Peterson Farms, Inc.'s poultry operations that was announced on or about June 3, 2008.

RFP number 2 suffers from the same defects as RFP number 1 in that it seeks information which is not relevant to any of the issues in the case. As stated previously, none of the purchased assets are located in the IRW.² During the meet and confer Plaintiff's counsel could not articulate how the requested documents with regard to assets not located in the IRW and not related to the claims in the case could be relevant. In fact, such documents are not relevant to any claim in the case.

Request No. 3: Please produce copies of any documents referring to or relating to reason(s) why Peterson Farms, Inc. decided to transfer its poultry operations to you.

The reasons why Peterson decided to sell certain assets to Simmons cannot possibly be relevant to any issues in this case. Moreover, any documents responsive to RFP number 3 would contain the utmost in private and confidential information, including financial information, business strategies, and other highly confidential information. Plaintiff can offer no justification for seeking this information as there is no theory under which the requested information could be relevant to the issues in this case.

Request No. 4: Please produce copies of any documents referring or relating to this lawsuit or the subject matter of this lawsuit that were exchanged between you and /or Peterson Farms, Inc. (including any persons or firms acting or purporting to act on its behalf) in connection with your acquisition of Peterson Farms, Inc.'s poultry operations that was announced on or about June 3, 2008.

Any documents responsive to Request number 4 are protected by the joint defense doctrine. In deciding previous motions filed in this case concerning the existence of the joint defense privilege, the Court has already ruled in the Defendants' favor and held that

² With the exception of the birds that were on the farms of the contract growers. However, there are no documents responsive to RFP number 2 regarding the birds.

the joint defense doctrine applies in the case. RFP number 4 seeks documents “referring or relating to this lawsuit or the subject matter of this lawsuit” which are the exact documents that are protected from disclosure by the joint defense doctrine. There is nothing about the APA that would alter the existence of the joint defense doctrine in this case.

The fact that any documents responsive to RFP number 4 are protected by the joint defense doctrine was discussed with Plaintiff’s counsel during the meet and confer telephone conference. Once again, Plaintiff’s counsel could not articulate any justification for seeking the documents or any theory as to how such documents would fall outside the protection of the joint defense doctrine.

CONCLUSION

The RFPs are overly broad in that they seek information that is not relevant to any issues in the case. Furthermore, the RFPs seek information that is highly confidential and the disclosure of which could be highly prejudicial to Simmons in the competitive market. For these reasons, Simmons prays that this Court enter its order relieving Simmons from any obligation to respond to the RFPs and for such other and further relief this Court deems just and proper.

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CERTIFICATE OF SERVICE

I hereby certify that on 20th day of October, 2008, I electronically transmitted the foregoing document to the Clerk of the Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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